

EAST BENCH IRRIGATION DISTRICT



CLARK CANYON RESERVOIR

1100 HWY 41

DILLON, MONTANA 59725

(406) 683-2307

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December 21, 2004

Jack Stoltz, Division Administrator
Montana Water Resources Regional Office
48 North Last Chance Gulch
P O Box 201601
Helena, MT 59620-1601

Dear Mr. Stoltz

Thank you for allowing the DNRC folks to attend the meeting in Three Forks to discuss some concerns of the Clark Canyon Water Supply, East Bench Irrigation District and the Bureau of Reclamation. It was a very productive and informative meeting. Out of that meeting, we came away with some questions we are hoping you can resolve.

As you know, Clark Canyon Reservoir was built back in the late 1950's and early 1960's for the multipurpose of irrigation, municipal, industry, fish, wildlife and recreation. Clark Canyon Reservoir provides irrigation for approximately 50,000 acres. Two entities were formed for administration purposes under the East Bench Unit. They are Clark Canyon Water Supply Company (CCWSC), which comprise the valley lands, and the East Bench Irrigation District (EBID), which comprise of the bench lands. Those in the valley that sign up for the project and receive supplemental water are called signers. There were some, because early priority water rights provide an adequate supply, did not sign up with the project and receive no supplemental water from the Reservoir. We refer to those as non-signers. We deliver water to all three entities, CCWSC, EBID and the non-signers. As you know, we are now starting our sixth year of a very severe drought. Storage and inflows into Clark Canyon Reservoir have been at record lows now for the last couple of years. East Bench Irrigation District received no water last irrigation season (2004).

When the project was first being considered, the practice of irrigation was all based on flood irrigation. As you are aware, those practices have changed over the last 40 years since the project went in. The Bureau of Reclamation (BOR) conducted an in-depth study of the Beaverhead River from 1910 to 1960. The study included historic river flows, water rights, water use and requirements, and historic accretions in various stretches of the Beaverhead River. The "signers" agreed to limit their use to 4 acre feet per acre at the diversion and to permit storage and regulation of river flows in excess of

the 4 acre-feet per net acre irrigated. They did not give up their water rights. Each May, April this last irrigation season, a River Commissioner is put on the Beaverhead River for the recording of the CCWSC water usage and the regulating of the non-signers. The East Bench Unit Office is charged with releasing as per requested by the River Commissioner. We are charged with determining if the non-signers have the necessary inflows and accretions for delivering them their water. This is where our first question comes in.

The first question is: Will our method for determining delivery of water to non-signers of the Beaverhead River stand up if challenged this coming irrigation season in 2005? I am enclosing a summation of water rights, the method for determining the delivery of water to the non-signers, and how we figure if they receive water. We have four different gaging stations on the Beaverhead River, at the Reservoir, Barretts, Dillon and the Point of Rocks. These stations are serviced by the USGS on a regular basis and more often if we feel moss build up is becoming a problem.

Enclosed is our chart for determining delivery to non-signers, the summation of water rights according to priority date, an example of the daily readings from the hydromet and the River Commissioners water record sheets. We have also enclosed a sample worksheet to help with the explanation below.

On Mondays, after the River Commissioner has recorded the deliveries to the diversions, we take a five day average of the Clark Canyon Reservoir's inflows from the hydromet. By using the delivery records and the station readings from the hydromet, we can determine the accretions at Barretts Station, Dillon Station and the Point of Rock Station. We then follow the delivery formula, which we have enclosed. We report to the River Commissioner our findings of which non-signers can receive water. Attached are the work sheets.

If you have any questions, please feel free to call us at (406) 683-2307, fax (406) 683-0065. Some feel the above process is not legal due to the fact the valley has changed their irrigation practices, there by depleting the accretions and inflows. They feel that the inflows and accretions can not be predicted if the dam was taken out of the picture. The CCWSC Board of Directors would like to meet with the District Judge by March 15, 2005 with the technical and legal findings from your reply to this letter.

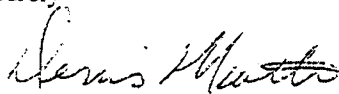
Question two deals with expanded acres. Because of irrigation practices, changes from flood to sprinkler to pivot, the same amount of water from the beginning of Clark Canyon Reservoir in 1965 is now being spread to approximately 35% (non-signers included) more acres of land. As explained by your staff, if, before salvage water came into the picture (I believe 1991), a person would have had to apply for a change of use permit to irrigate the expansion of acres due to the change of irrigation that person was using. Under what authority does the DNRC have over surface water in a federally contracted basin where the water rights have already been decreed and any excess is stored by the Bureau of Reclamation authorized in the water-user agreement when they signed up for

the project. East Bench Irrigation District feels this is one cause as to why they received no water last summer.

The last concern of the East Bench Unit is the adjudication process and where the Beaverhead River is on the priority list of basins to be reviewed. Given the nature of the drought and all the concerns of all the parties on water distribution, expanded acres, the issuance of new permits, surface or ground water, and contract renewal, CCWSC and EBID would urge you to step up the priority of adjudicating the Beaverhead basin.

Thank you in advance for your time and legal expertise in answering our questions. We look forward to hearing from you.

Sincerely



Dennis Miotke
Project Manager

DM:sjd

Enclosures

Cc: Lenny Duberstein, BOR
Rich Moy, DNRC

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION



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February 8, 2005

Mr. Dennis Miotke
Project Manager
East Bench Irrigation District
1100 HWY 41
Dillon, MT 58725

Dear Mr. Miotke:

The DNRC recognizes the difficult water distribution issues facing water users in the Beaverhead River Basin. And because our agency is charged generally with coordinating the development and use of water within the State, we feel compelled to help you in better managing the resource. However, we must proceed with caution when issues involve water distribution between competing water users that is under the jurisdiction of the District Court. For instance, it would not be proper for the DNRC, as a public agency, to assert legal opinion or provide expert analysis that could be perceived as favoring one side over another. Under these constraints, we will attempt to respond to your questions and to offer our assistance where we can.

It will ultimately be up to the court to determine whether a method for distributing water by priority is proper. From an impartial, technical standpoint, the DNRC could review the current procedures and offer comments and suggestions for improvement if asked to do so by the District Court. In the end, however, any allocation procedure will have to be approved by the Court. The DNRC is not in a position to prejudge whether or not the Court would deem your allocation procedure as appropriate.

As you know, the U.S. Bureau of Reclamation is funding research for the purpose of better understanding the hydrology of the Beaverhead River basin. The DNRC intends to assist the Bureau of Reclamation with this effort. The information acquired through this research might be useful in improving water management in the basin. We look forward to assisting you in understanding this information and in applying it to basin water management plans where appropriate.

Your second question concerns the DNRC's authority over the expanded acres of irrigation. The DNRC's view is that new irrigation requires a water right. Such a water right is usually obtained by applying to the DNRC for a new use permit under Mont. Code Ann. § 85-2-311 or applying to the DNRC for authorization to change the place of

EXHIBIT M

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WATER RIGHTS
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use of an existing water right under Mont. Code Ann. § 85-2-402. It would not be possible at this time to obtain a permit for a new irrigation water use with surface water, because the upper portions of the Missouri River basin are closed to these new appropriations (§85-2-341). A change of use authorization is a requirement for use of salvaged water, see Mont. Code Ann. § 85-2-419, just as such authorization is required where one plot of land is taken out of irrigation and the water applied to a new plot.

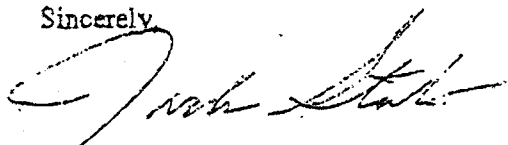
The underlying storage right held by the Bureau of Reclamation (BOR), a Federal agency, is a state based water right and is subject to the same place of use limitations as any other state based water right except in one possible respect. It may be the case for the stored water that the BOR claimed a "general service area" for the place of use. If so, stored water might be applied to new irrigation without obtaining a change authorization as long as the new area were within the general service area claimed for the Project, and as long as the quantity of stored water used is not increased. Usually, if additional land is irrigated, more water is used.

Your letter indicates that the signers entered into an agreement with the BOR under which existing decreed rights were commingled with the storage right. This fact presents several legal issues that may need to be sorted out between the BOR, the signers, and the Water Court. If such an agreement were entered now, a change authorization would probably be required. However, if the arrangement were made before the effective date of the Water Use Act (1973), it would be beyond the DNRC's purview.

The last concern expressed in your letter is adjudication priority for the Beaverhead basin. You should refer to Mont. Code Ann. 85-2-218 in this regard. You may wish to talk with your local legislators or initiate a petition to the court to prioritize an adjudication of your water rights claims.

The DNRC applauds your efforts to get matters moving early. We are here to assist you with your efforts, so that the Court will be equipped with the best available information to properly manage water in the Beaverhead basin.

Sincerely,



Jack Stults
Administrator
Water Resources Division

cc: Rich Moy
Fred Robinson
Lenny Duberstein